107

(2)

No. 08-291

Supreme Court, U.S.
FILED
OCT 1 - 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RISCHON DEVELOPMENT CORPORATION,

Petitioner,

v.

CITY OF KELLER, TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS AT FORT WORTH, TEXAS

BRIEF IN OPPOSITION

L. STANTON LOWRY
DOUGLAS H. CONNOR, III
MICHAEL K. KALLAS
BOYLE & LOWRY, L.L.P.
4201 Wingren
Suite 108
Irving, Texas 75062
(972) 650-7100

S.G. JOHNDROE III,
Counsel of Record
SCOTT A. FREDRICKS
MARY H. BARKLEY
CANTEY HANGER LLP
600 West 6th Street
Suite 300
Fort Worth, Texas 76102
(817) 877-2800

Attorneys for Respondent

218492

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
STATEMENT OF JURISDICTION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	
A. Rischon failed to present or preserve the federal questions raised by its petition for writ of certiorari.	5
B. There is no "safe-harbor" in conflict with this Court's decisions in *Nollan* and *Dolan* created by the Fort Worth Court of Appeals' decision.	7
C. The Fort Worth Court of Appeals did not modify or reverse the trial court's conclusions of law but simply and permissibly construed the findings and conclusions to be in harmony with the judgment.	11
CONCLUSION	14

TABLE OF CITED AUTHORITIES

Page

Cases:

Adams v. Robertson,
520 U.S. 83 (1997) 5

Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte,
481 U.S. 537 (1987) 5

BMC Software Belgium, N.V. v. Marchand,
83 S.W.3d 789 (Tex. 2002) 13

Brown v. Frontier Theatres, Inc.,
369 S.W.2d 299 (Tex. 1963) 12

Dolan v. City of Tigard,
512 U.S. 374 (1994) 4, 7, 9, 14

In re Humphreys,
88 S.W.2d 402 (Tex. 1994), *cert. denied*,
513 U.S. 964 (1994) 13

Lone Star Cement Corp. v. Fair,
467 S.W.2d 402 (Tex. 1971) 12

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982) 9, 10

Mayhew v. Town of Sunnyvale,
964 S.W.2d 922 (Tex. 1998), *cert. denied*,
526 U.S. 1144 (1999) 13

Cited Authorities

Page

Nollan v. California Coastal Comm'n,
483 U.S. 825 (1987) 7, 9, 14

Rischon Dev. Corp. v. City of Keller,
242 S.W.3d 161 (Tex. App. – Fort Worth 2007,
pet. denied) 1, 3, 6, 7, 9, 12

Suburu of Am., Inc.
v. David McDavid Nissan, Inc.,
84 S.W.3d 212 (Tex. 2002) 13

Webb v. Webb,
451 U.S. 493 (1981) 5

Statutes:

28 U.S.C. § 1257(a) 1

Constitutional Provisions:

TEX. CONST. art. I, § 17 ..... 2, 8

United States Constitution:
Fifth Amendment 1, 2, 3, 10
Fourteenth Amendment 1, 3, 10, 11, 13, 14

STATEMENT OF JURISDICTION

The United States Supreme Court lacks jurisdiction over this proceeding under 28 U.S.C. § 1257(a) because Rischon failed to raise or preserve any rights under the United States Constitution. As noted by the Fort Worth Court of Appeals:

> Although Rischon contends in its first and second issue statements that it established a taking "under federal law," nowhere in its brief does it cite or even mention the federal constitution; nor did it allege a taking under the federal constitution in its trial court pleadings. And in a trial court brief, Rischon specifically stated, "[W]e are in fact litigating based upon the Texas Constitution . . . ." Therefore, we construe Rischon's claims to allege a taking under the Texas constitution only.

Rischon Dev. Corp. v. City of Keller, 242 S.W.3d 161, 167 n.2 (Tex. App.—Fort Worth 2007, pet. denied). Quite simply, Rischon never pursued claims under the United States Constitution and none of the state courts rendered any judgment or opinion on any question of federal law. The Fifth and Fourteenth Amendments of the United States Constitution are conspicuously absent from the trial and appellate pleadings filed by Rischon prior to its petition for writ of certiorari to this Court.

STATEMENT OF THE CASE

This inverse condemnation case was decided under the Texas Constitution's provision that "[n]o person's property shall be taken . . . unless by the consent of such person." TEX. CONST. art. I, § 17. Rischon attempts for the first time at this stage to make this a "federal case." Rischon, who desired to develop a 19 acre tract within the City of Keller, Texas, brought this suit challenging the application of the City's development regulations under Texas law. The trial court and Court of Appeals determined that Rischon consented to the regulations and therefore was not entitled to compensation. Rischon's statement of the case misstates and omits key portions of the factual and procedural record of this case.

First, Rischon states that its Fifth Amendment arguments were "discussed extensively at the trial court level" (Petition at 15) and in its appellate briefs (Petition at 15-18). This is a misstatement of the record. Rischon's live pleadings in the trial court simply challenged the City of Keller's development regulations as being "in violation of the laws of Texas and the Texas Constitution." (CR 39; Rischon's First Amended Original Petition, p. 11.) Rejecting Rischon's attempt to inject a federal question for the first time at the appellate level, the Court of Appeals stated:

> [N]owhere in its brief does it cite or even mention the federal constitution; nor did it allege a taking under the federal constitution in its trial court pleadings. And in a trial court brief, Rischon specifically stated,

> "[W]e are in fact litigating based upon the Texas Constitution. . . ."

Rischon Dev. Corp. v. City of Keller, 242 S.W.3d 161, 167 n.2 (Tex. App.—Fort Worth 2007, pet. denied). Accordingly, neither the trial court nor the Court of Appeals considered the Fifth or Fourteenth Amendment issues presented to this Court. Rather, the judgment of the trial court and opinion of the Court of Appeals rest entirely on the interpretation and application of the takings clause of the Texas Constitution.

Second, Rischon omits mentioning in its petition that the trial court made extensive factual findings that Rischon "proposed," "consented to," "did not object to," and "agreed" to each of the complained of requirements. (Pet. App. 1; Supp. CR 4; Trial Court's Findings of Fact Nos. 8, 9, 10, 11, 14, 17, 26; Concls. of Law Nos. 5, 6.) *See Rischon Dev. Corp.*, 242 S.W.3d at 163-166. Rischon chose not to challenge a single one of these factual findings of consent and agreement made by the trial court. *Rischon Dev. Corp.*, 242 S.W.3d at 166 and 169. Accordingly, the Court of Appeals concluded that "by proposing, adopting without objection, or agreeing in the Developer's Agreement without objection to all of the Rolling Wood 'requirements,' Rischon consented to those requirements." *Id.* at 169.

Rischon also omits the fact that it did not even purchase the property until *after* six of the eight so-called "requirements/exactions" had already been imposed on the property at its request or agreement. The Court of Appeals recognized that this defect could deprive Rischon of standing to challenge these particular requirements. *Rischon Dev. Corp.*, 242 S.W.3d at 166 n.1.

Finally, Rischon ignores the evidence presented to the trial court establishing that each requirement satisfied both the "essential nexus" and "rough proportionality" requirements of the very federal cases it invokes. In fact, Rischon did not even appeal the trial court's conclusion that each of the requirements substantially advanced legitimate government interests. As for the rough proportionality test of *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994), the trial court heard testimony from numerous witnesses of the impact the proposed development would have on city parks, city roads, city utility lines, and public safety thereby necessitating each of the requirements essential for Rischon's development. The trial court concluded that the City cleared the constitutional hurdle set forth in this Court's decisions as adopted into the takings jurisprudence of the Texas Constitution.

The opinion of the Court of Appeals sets forth in more detail the factual and procedural background and is hereby incorporated by reference.

REASONS FOR DENYING THE PETITION

A. Rischon failed to present or preserve the federal questions raised by its petition for writ of certiorari.

The jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. *Webb v. Webb*, 451 U.S. 493, 496 (1981). At a minimum, there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. *Id.* at 501. The mere citation to federal case law in a state court petition or brief is insufficient to inform a state court that it has been presented with a claim subject to this Court's appellate jurisdiction. *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 n.9 (1987). Moreover, when the highest state court is silent on the federal question brought to this Court, this Court assumes that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had a fair opportunity to address the federal question that is sought to be presented here. *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997).

Rischon's petition to the trial court sought determination of only the validity of the City's requirements under the Texas Constitution. (CR 39;

Rischon's First Amended Original Petition.) It is telling that the only trial court document Rischon can point to that even obliquely refers to federal constitutional precedents is the trial brief submitted to the trial court on the eve of trial. Notably, that document discusses these federal precedents in the context of attempting to convince the trial court to apply the federal *analysis* to the *Texas Constitution.* Rischon's trial brief admits as much:

> In this case, *because we are in fact litigating based upon the Texas Constitution* it would seem only logical that the standard to be imposed is that of a strict correlation between the requirements rather than a rough proportionality since the lesser guarantees of the Federal Constitution were what triggered the protections of *Dolan* and were acted upon in the *Flower Mound* case.

(Pet. App. 3, p. 7) (emphasis added); *see also Rischon Dev. Corp.*, 242 S.W.3d at 167 n.2. Moreover, the actual live pleading upon which the case was tried to the bench only alleged a "taking of value in property in violation of the requirements of the laws of Texas and the Texas Constitution." (CR 49; Rischon's First Amended Original Petition, p. 11)

Further evidence that the trial court was never presented with or considered a federal constitutional claim can be gleaned from that court's conclusions of law from which any mention of the federal constitution is missing. On the other hand, the trial court issued a

clear and unequivocal holding concerning the Texas Constitution:

> 10. The City's zoning regulations and ordinances at issue and in effect at all times material to this lawsuit and the City's actions do not constitute a taking under Texas Constitution, Article I, § 17.

(Pet. App. 1; Supp. CR 12; Concl. of Law No. 10.)

Even on appeal, though it crafted two issue statements referring to "federal law", it never cited or mentioned any provisions of the Federal Constitution, leaving the Court of Appeals to conclude that Rischon claimed a taking under the Texas Constitution only. *Rischon Dev. Corp.*, 242 S.W.3d at 167 n.2.

Accordingly, because Rischon failed to present the federal constitutional issue to the trial court for determination in the first instance, that question is not properly before this Court.

B. There is no "safe-harbor" in conflict with this Court's decisions in *Nollan* and *Dolan* created by the Fort Worth Court of Appeals' decision.

Rischon argues that the Court of Appeals' opinion below creates an "unfettered safe-harbor" within which local governments may "require consent" from developers to otherwise unconstitutional exactions. A clear reading of the trial court judgment and opinion of the Court of Appeals does not compel such a conclusion.

First, as shown above, the trial court judgment and Court of Appeals' opinion both are founded solely upon an analysis of the consent clause of article I, section 17 of the Texas Constitution: "No person's property shall be taken, damaged or destroyed for, or applied to public use without adequate compensation being made, *unless by the consent of such person.*" (emphasis added). At no point before any other court has Rischon challenged the federal constitutionality of this provision of the Texas Constitution, but Rischon implies such a challenge for the first time here.

Second, Rishcon's argument rests on a factual premise of coercion that was rejected by the trial court and Court of Appeals. The trial court made numerous explicit findings that "Rischon proposed" or "Rischon consented to" or "Rischon did not object" or "Rischon agreed" to each of the now-complained-of development obligations. (Pet. App. 1; Supp. CR 4; Findings of Fact Nos. 8, 9, 10, 11, 14, 17, 26; Concls. of Law Nos. 5, 6.) The trial court concluded that "[a]ll of the provisions of PD-938 or the Rolling Wood development were proposed or adopted by Rischon without objection." (Pet. App. 1; Supp. CR 11; Concl. of Law No. 5.) Notably, Rischon did not challenge any of these factual findings on appeal and the Court of Appeals reached the same conclusion:

> We hold that by proposing, adopting without objection, or agreeing in the Developer's Agreement without objection to all of the Rolling Wood "requirements," Rischon consented to those requirements. Therefore,

> the trial court did not err by rendering a take nothing judgment on Rischon's claims.

Rischon Dev. Corp., 242 S.W.3d at 169. Rischon omits what the trial court and Court of Appeals recognized – Rischon only complained *after* Rischon had consented to the planned development zoning ordinance and freely entered into a developer's agreement with the City. *Id.* at 168. The real question posed by Rischon's conduct and claim is not whether a city may coerce consent from a developer, but whether a city is open to after-the-fact takings challenges to zoning and development agreements it makes with developers. Here, the state courts considered the matter and determined that the City had not coerced Rischon and had acted within the bounds of the Texas Constitution. Where the property owners in *Nollan* and *Dolan* challenged the local government's development requirements from the moment they were imposed, Rischon proposed and agreed to all of the requirements until it later found them economically disadvantageous. *Compare Nollan v. California Coastal Comm'n*, 483 U.S. 825, 828-29 (1987) and *Dolan*, 512 U.S. at 380-82 with *Rischon Dev. Corp.*, 242 S.W.3d at 168.

The opinion of the Texas appellate court does not create a "safe-harbor" or other exception to this Court's holdings in *Nollan* and *Dolan* – first because it is founded on a clause of the Texas Constitution, and second because its opinion is based upon a radically different set of facts.

Rischon cites only one case in support of its argument that the City's actions required Rischon to consent to the City's regulations: *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). However, that case did not address any "consent"

issue. The only issue in *Loretto* was "whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution." *Id.* at 421. New York law provided that landlords could not interfere with installation of cable television facilities upon the landlord's property. *Id.* at 423. This Court held that a "permanent physical occupation authorized by government is a taking. . . ." *Id.* at 426. Accordingly, this Court held that there was a compensable taking, but emphasized that the holding applies only to physical takings:

> Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation. We do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property.

Id. at 441. The *Loretto* holding is not applicable in the present case where a physical taking was not alleged and all of the requirements were agreed to or proposed by Rischon.

C. The Fort Worth Court of Appeals did not modify or reverse the trial court's conclusions of law but simply and permissibly construed the findings and conclusions to be in harmony with the judgment.

Rischon never cited or claimed the Fourteenth Amendment of the United States Constitution as a ground for relief in the state courts below. Specifically, Rischon's petition for review to the Texas Supreme Court does not cite the Fourteenth Amendment or even include the phrase "equal protection." As shown above, Rischon has not preserved this issue for consideration by this Court.

Nevertheless, Rischon charges the Court of Appeals with violating Texas appellate procedure by modifying or reversing the trial court's conclusions of law as they pertain to whether or not the City of Keller met its burden in establishing consent under the Texas Constitution. Of course, one will search in vain for any such modification or reversal in the opinion of the Court of Appeals. Rather, the Court of Appeals undertook the unsurprising task of construing the trial court's findings of fact and conclusions of law to determine whether they supported the judgment of the trial court that a violation of the Texas Constitution's takings provision had not occurred:

> While the only conclusion [of law] containing the word "consent" is the one dealing with the roadway impact fees and the park fees, the trial court also concluded that Rischon proposed or adopted without objection *all* of

> the Rolling Wood requirements. In this case, in light of the trial court's unchallenged findings of fact, "proposed or adopted without objection" is indistinguishable from "consented."

Rischon Dev. Corp., 242 S.W.3d at 169. As one might expect, such construction or interpretation of a trial court's findings and conclusions is well within the authority of a Texas intermediate appellate court. In Texas the same rules of interpretation apply in construing the meaning of a court order or judgment as in ascertaining the meaning of other written instruments. *Lone Star Cement Corp. v. Fair*, 467 S.W.2d 402, 404-405 (Tex. 1971). Accordingly, the entire contents of the instrument and record are to be considered and read as a whole. *Id.* at 405. More specifically, findings of fact and conclusions of law are to be construed together and if the findings of fact are susceptible of different construction, they will be construed, if possible, to be in harmony with the judgment and to support it. *Brown v. Frontier Theatres, Inc.*, 369 S.W.2d 299, 301 (Tex. 1963). It is not surprising then that the Court of Appeals in the instant case reviewed the findings and conclusions together and determined that it was possible to construe them in support of the trial court judgment that an uncompensated taking under the Texas Constitution had not occurred.

When a trial court's conclusions of law are challenged, the proper standard of review is de novo. *See Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999); *In re Humphreys*, 88 S.W.2d 402, 404 (Tex. 1994), *cert. denied*, 513 U.S. 964 (1994). In such a review, the reviewing court exercises its own judgment, redetermines each legal issue, and will uphold the conclusions on appeal if the judgment can be sustained on any legal theory supported by the evidence. *Suburu of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 222 (Tex. 2002). Incorrect conclusions of law will not require reversal if the controlling findings of fact support a correct legal theory. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). In following these standards, the Court of Appeals did not violate the Fourteenth Amendment of the United States Constitution.

CONCLUSION

A federal constitutional taking claim was not presented below. Nor does the decision below create an exception to this Court's holdings in *Nollan* and *Dolan* or violate the Equal Protection Clause of the Fourteenth Amendment in its application of Texas appellate procedure. Accordingly, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

S.G. JOHNDROE III,
Counsel of Record
SCOTT A. FREDRICKS
MARY H. BARKLEY
CANTEY HANGER LLP
600 West 6th Street
Suite 300
Fort Worth, Texas 76102
(817) 877-2800

L. STANTON LOWRY
DOUGLAS H. CONNOR, III
MICHAEL K. KALLAS
BOYLE & LOWRY, L.L.P.
4201 Wingren
Suite 108
Irving, Texas 75062
(972) 650-7100

Attorneys for Respondent